

Perbadanan Nasional Bhd v Syed Omar bin Syed Mohamed

A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-1071
OF 2010

VARGHESE GEORGE JC

21 JANUARY 2011

B

Civil Procedure — Striking out — Refiling of action — Plaintiff failed to comply with peremptory order for discovery of documents — Action later struck off for want of prosecution — Plaintiff's default 'intentional and contumelious' — No appeal against striking out order — Plaintiff refiled action against same defendant on same facts and for same relief as first action — Whether second suit abuse of process of court — Affidavit in reply filed late contrary to O 32 r 13(2)(b) of the Rules of High Court 1980 ('RHC') — Whether there was application for extension of time or explanation for delay — Whether non-compliance curable under O 1A of the RHC

C

D

In an action filed against it by the plaintiff in 2006 ('the 2006 action'), the defendant obtained an order against the plaintiff for discovery of documents ('order for discovery'). Pursuant to that order (i) the plaintiff was required to file an affidavit disclosing all documents in its possession within a stipulated time (ii) if the plaintiff failed to do so, the defendant had liberty to apply to strike out the suit under O 24 r 16 of the Rules of the High Court 1980 ('RHC') and (iii) all further proceedings in the suit were stayed pending the plaintiff's compliance with the order unless it obtained leave to revive or recommence the suit. The plaintiff neither appealed against the order for discovery nor complied with it. Less than a year later, the court on its volition issued the plaintiff a show cause notice why the action should not be struck out for want of prosecution. The plaintiff neither filed an affidavit to explain its failure to comply with the order for discovery nor did it, even at that stage, do the necessary to comply with the order. The deputy registrar struck out the suit on the ground the plaintiff's want of prosecution was 'intentional and contumelious'. The plaintiff's appeal to the judge in chambers against that decision was dismissed and the deputy registrar's decision was affirmed. The plaintiff did not appeal the judge's decision but filed a fresh suit against the defendant based on the same facts and for the same relief as the 2006 action maintaining that limitation had not set in. The defendant applied under O 18 r 19(1)(b), (c) and (d) of the RHC and the inherent jurisdiction of the court to strike out the writ and statement of claim in the fresh suit. At the hearing of the application, the defendant sought to exclude the plaintiff's affidavit in reply from being considered as it was filed out of time contrary to O 32 r 13 of the RHC. The plaintiff neither applied for extension of time nor explained the delay. It said the late filing had not prejudiced the defendant, that it was a technical

E

F

G

H

I

A non-compliance curable under O 1A and O 2 r 3 of the RHC, and that its exclusion from consideration would cause grave injustice to the plaintiff.

Held, allowing both application and suit with costs:

B (1) The filing of the fresh suit against the defendant, notwithstanding that it was brought before any limitation had set in, was an abuse of process of the court (see para 30).

C (2) It was an accepted principle of law that where a suit had been struck out in the context of a peremptory order on the ground of 'intentional and contumelious' default of the plaintiff in that suit, a second suit against the same defendant on the same facts and for the same relief should be treated as an abuse of process of court and struck out as well. The fact that the second suit was filed before expiry of the limitation period was of no consequence (see para 29).

D (3) The order for discovery in the 2006 action was in the nature of a peremptory order. The deputy registrar struck out that action on the express finding the plaintiff's default had been intentional and contumelious. The dismissal of the appeal against that decision was not shown to be on any other ground than as was determined by the deputy registrar (see paras 21 & 23–24).

E (4) Since time could be extended by consent of parties or on application of a defaulting party, the requirement in O 32 r 13(2)(b) of the RHC did not amount to a stipulation that was so 'vital as to go to the root of the matter' or was of such a 'fundamental' nature, although 'must' was the term used in the relevant rule to specify the requirement (see para 18).

F (5) When faced with an issue of whether to override a procedural non-compliance, the court had to balance justice between the parties with particular regard to the question whether serious miscarriage of justice would be occasioned. In this case, no serious miscarriage of justice would be occasioned to the defendant if the affidavit in reply and subsequent affidavits were read in the disposal of the application (see para 19).

H **[Bahasa Malaysia summary]**

I Dalam satu tindakan yang difailkan terhadap dirinya oleh plaintiff pada 2006 ('tindakan 2006'), defendan mendapatkan perintah terhadap plaintiff untuk penzahiran dokumen-dokumen ('perintah penzahiran'). Menurut perintah tersebut (i) plaintiff perlu memfailkan afidavit menunjukkan semua dokumen yang berada dalam milikannya dalam satu jangka masa (ii) sekiranya plaintiff gagal berbuat demikian, defendan berhak untuk memohon penolakan guaman di bawah A 24 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan (iii) semua prosiding selanjutnya dalam guaman digantung sementara plaintiff

mematuhi perintah tersebut melainkan plaintif telah mendapatkan kebenaran untuk menghidupkan semula atau memulakan semula guaman tersebut. Plaintif tidak merayu terhadap perintah penzahiran tersebut mahupun mematuhi. Tidak kurang daripada setahun kemudian, mahkamah mengeluarkan notis tunjuk sebab kepada plaintif di atas pelanggaran untuk menyatakan kenapa tindakan tersebut tidak boleh ditolak kerana ketiadaan pendakwaan. Plaintif tidak memfailkan affidavit untuk menerangkan kegagalan beliau untuk mematuhi perintah penzahiran mahupun melaksanakannya, meskipun pada peringkat tersebut dan melakukan apa yang sepatutnya bagi memenuhi perintah tersebut. Timbalan pendaftar menolak guaman atas dasar ketiadaan pendakwaan plaintif adalah 'disengajakan dan bersifat menghina'. Rayuan plaintif kepada hakim dalam kamar terhadap keputusan tersebut ditolak dan keputusan timbalan pendaftar diakui. Plaintif tidak merayu terhadap keputusan hakim tersebut tetapi memfailkan guaman baru terhadap defendan berdasarkan fakta yang sama dan bagi mendapatkan relief yang sama seperti tindakan 2006 memandangkan ia belum melebihi had masa. Defendan memohon di bawah A 18 k 19(1)(b), (c) dan (d) KMT dan bidang kuasa sedia ada mahkamah untuk menolak writ dan pernyataan tuntutan di dalam guaman baru. Pada pendengaran permohonan, defendan menuntut untuk mengecualikan affidavit balasan plaintif daripada dipertimbangkan memandangkan ia difailkan melebihi masa dan bercanggah dengan A 32 k 13 KMT. Plaintif tidak memohon bagi perlanjutan masa mahupun menerangkan kelewatan tersebut. Dinyatakan bahawa pemfailan lewat tidak memprejudiskan defendan, bahawa ia merupakan satu ketidakpatuhan teknikal yang boleh diatasi di bawah A 1A dan A 2 k 3 KMT dan bahawa pengecualian affidavit tersebut akan mengakibatkan ketidakadilan serius kepada plaintif.

Diputuskan, membenarkan permohonan kedua-dua permohonan dan guaman dengan kos:

- (1) Pemfailan guaman baru terhadap defendan, meskipun dilakukan sebelum had masa, merupakan penyalahgunaan proses mahkamah (lihat perenggan 30).
- (2) Prinsip undang-undang yang terpakai ialah apabila sesebuah guaman ditolak di dalam konteks perintah muktamad atas dasar kemungkiran plaintif yang 'disengajakan dan bersifat menghina' di dalam guaman tersebut, guaman kedua ke atas defendan yang sama dengan fakta yang sama dan bagi mendapatkan relief yang sama dianggap sebagai satu penyalahgunaan proses mahkamah dan juga akan ditolak. Fakta bahawa guaman kedua difailkan sebelum tamat had masa adalah tidak penting (lihat perenggan 29).
- (3) Perintah untuk penzahiran pada tindakan 2006 adalah bersifat perintah muktamad. Timbalan pendaftar menolak tindakan tersebut setelah

- A mendapati secara jelas bahawa kemungkiran plaintif adalah disengajakan dan bersifat menghina. Penolakan rayuan terhadap keputusan tersebut tidak dibuat berdasarkan mana-mana alasan selain seperti yang diputuskan oleh timbalan pendaftar (lihat perenggan 21 & 23– 24).
- B (4) Memandangkan masa boleh dilanjutkan dengan persetujuan pihak-pihak atau permohonan pihak yang mungkir, keperluan dalam A 32 k 13 (2)(b) KMT bukanlah suatu syarat yang sangat ‘penting hingga ke akar umbi perkara’ atau sesuatu yang bersifat ‘utama’, walaupun ‘mesti’ merupakan terma yang digunakan di dalam kaedah tersebut bagi menentukan keperluan (lihat perenggan 18).
- C (5) Apabila berdepan dengan isu sama ada untuk mengatasi ketidakpatuhan prosedur, mahkamah perlu mengimbangi keadilan di antara pihak-pihak dengan mengambilkira persoalan sama ada ia akan mengakibatkan ketidakadilan yang serius. Dalam kes ini, tidak terdapat ketidakadilan yang serius yang akan menimpa defendan sekiranya affidavit balasan dan affidavit berikutnya dibaca tanpa permohonan (lihat perenggan 19).]
- D

Notes

- E For cases on refiling on action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7552–7553.

Cases referred to

- F *Amirthanayaki Kumurasamy v Lembaga Kelayakan Profesional Undang-Undang Malaysia (Legal Profession Qualifying Board Malaysia)* [2010] 1 MLJ 656; [2010] 6 CLJ 593, CA (refd)
- Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; [1997] 3 CLJ 51, HC (refd)
- Bank Utama (Malaysia) Bhd v Rindaya Sdn Bhd* [2006] 8 CLJ 29, HC (refd)
- G *Birkett v James* [1977] 2 All ER 801, HL (refd)
- Boo Are Ngor v Chua Mee Liang* [2008] 4 CLJ 533, CA (refd)
- Courts Mammoth Bhd v Subramaniam all Paramasivam* [2007] 4 MLJ 544; [2007] 3 CLJ 69, HC (refd)
- H *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)
- Janov v Morris* [1981] 3 All ER 780, CA (refd)
- Jokai Tea Holdings Ltd, Re* [1992] 1 WLR 1196, CA (refd)
- Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481; [2001] 3 CLJ 233, FC (refd)
- I *Neo Kee Seng v Ong Seng Development Sdn Bhd & Ors* [2000] 1 CLJ 715, HC (refd)
- Palm Breeze Sdn Bhd v Ho Hup Construction Co Bhd* [1998] 4 MLJ 674; [1998] 5 CLJ 516, HC (refd)

Sim Lim Finance Ltd v Highlight Industry Pte Ltd & Ors [1987] 1 MLJ 182 (refd) A

Tang Liang Hong v Lee Kuan Yew & Anor and other appeals [1998] 1 SLR 97, CA (refd)

Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152, FC (refd) B

Legislation referred to

Rules of the High Court 1980 O 1A, O 2 r 3, O 18 r 19 (1)(b), (c), (d), O 24 r 16, O 32 r 13, 13(2), 13(2)(b), 34 rr 3, 8(2) Form 64

Alan Wong (Cliff Siow with him) (Zain Megat & Murad) for the plaintiff. C
Richard WG Lee (Richard Lee) for the defendant.

Varghese George JC:

[1] Enclosure 4 was an application by the defendant for the writ and statement of claim to be struck out with costs. The application was brought pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('RHC 1980') and the inherent jurisdiction of the court. The application was supported by the defendant's affidavit (encl 5) and *afidavit tambahan* (encl 8). The other affidavits filed in this application were: D E

- (a) *afidavit jawapan plaintiff* (encl 9);
- (b) *afidavit balasan defendan* (encl 11);
- (c) *afidavit jawapan plaintiff* (2) (encl 12); and
- (d) *afidavit balasan defendant* II (encl 13).

F

BACKGROUND FACTS

G

[2] In 2006, the plaintiff had filed a suit against the defendant vide KL High Court Suit D1-22-270 of 2006 ('the 2006 suit') based on the same facts and for same relief as is set out now in this action.

[3] Pursuant to an application by the defendant for discovery of documents in the 2006 suit, an order of court had been issued against the plaintiff on 31 October 2008, whereby it was ordered: H

- (a) that the plaintiff was to file an affidavit to disclose all documents in the plaintiff's possession within a stipulated time, and I
- (b) that, should the plaintiff fail to do so, the defendant was at liberty to apply to strike out the suit pursuant to O 24 r 16 of the RHC 1980, and in the meanwhile all further proceedings in that suit was to be stayed

- A pending compliance by the plaintiff of the discovery order of 28 October 2008, *unless* the plaintiff obtained leave of court to revive or recommence the 2006 proceedings.
- B [4] The plaintiff did not lodge any appeal against that order of court of 31 October 2008 in the 2006 suit and neither did the plaintiff comply with the order to make the discovery of document by affidavit within the time ordered by court in that suit.
- C [5] On 25 August 2009 the court on its own volition issued to the plaintiff a 'notice to show cause' in the 2006 suit as to why the suit should not be struck out as no further action been taken by the plaintiff on the file.
- D [6] On 15 September 2009 the deputy registrar proceeded to strike out the 2006 suit upon the hearing of the notice to show cause.
- E It should be noted that the plaintiff did not file any affidavit in response to the notice to show cause to give any answer or satisfactory explanation for non-compliance of the order of the court of 2006 (the necessity to file such an affidavit has been stated in the decision of our Federal Court in *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152).
- F More significant however was the fact that there was also no attempt made by the plaintiff to either file and/or tender an affidavit disclosing documents that the plaintiff would rely on even at that stage.
- G [7] Before the deputy registrar, the plaintiff's explanation from the Bar was rejected. The deputy registrar in her finding/conclusion held expressly that the plaintiff's delay in proceeding with the further prosecution of the 2006 suit was 'intentional and contumelious' default (as opposed to merely an 'inordinate and inexcusable delay') and that was ground enough for the suit to be struck out.
- H [8] The plaintiff then appealed against the decision of the deputy registrar given on 15 September 2009 and the appeal was heard by Abdul Aziz bin Abdul Rahim J on 20 January 2010. The learned judge after hearing parties proceeded to dismiss the plaintiff's appeal thereby affirming the deputy registrar order of 15 September 2009 striking out the 2006 suit.
- I [9] The plaintiff did not file any appeal against the learned judge's decision of 20 January 2010 (ie on the appeal) from the deputy registrar's decision) but chose instead to file this present suit on 27 May 2010, which for all intents and purposes was a fresh action (or a second suit) for the same relief based on the

same set of facts. The plaintiff maintained that as no statutory limitation had set in, the plaintiff was entitled to bring this fresh proceedings against the defendant.

A

[10] Before the substantive application in encl 4 was dealt by me on its merits, counsel for the defendant raised a *preliminary issue*, namely as to the admissibility of the plaintiff's affidavit in reply (encl 9) filed out of time in contravention of O 32 r 13 of the RHC 1980. It was argued for the defendant that encl 9 (and all subsequent affidavits) should therefore be excluded from being read or given any consideration by this court in the disposal of encl 4.

B

C

[11] It was a fact that encl 9 was filed out of time and that the plaintiff had neither filed an application for an extension of time nor for that matter, was there any explanation given in that affidavit itself for the delay in the late filing of plaintiff's affidavit in reply to the defendant's application to strike out this present action. The plaintiff nevertheless from the Bar sought of this court not to exclude that affidavit (encl 9) (and other subsequent affidavits) since in the words of the plaintiff's counsel 'the Plaintiff (will) suffer grave injustice if Plaintiff's Affidavit in Reply is to be expunged'.

D

The plaintiff also contended that the late filing of the affidavit in reply did not cause 'prejudice' to the defendant in any event and for this relied on O 1A and O 2 r 3 of the RHC 1980 to argue further that it was merely a 'technical non-compliance' which was 'curable', in any event.

E

ISSUE: WHETHER THE AFFIDAVIT IN REPLY (ENCL 9) SHOULD BE ENTERTAINED BY THE COURT

F

[12] This issue as to whether an extension of time should be allowed for the filing of an affidavit in reply transgressing the strict time deadline set for the same in O 32 r 13(2)(b) of the RHC 1980, had been considered in various reported decisions of the courts. However for the present purpose, I need to only refer to two of them to obtain some guidance as to how to approach this issue.

G

[13] Abdul Malik Ishak J (as he then was) in *Courts Mammoth Bhd v Subramaniam all Paramasivam* [2007] 4 MLJ 544; [2007] 3 CLJ 69 in allowing an application for extension of time to file an affidavit in reply out of time, observed that the court had to determine where the justice of the case lay and in that regard whether the party opposing the extension had shown any exceptional circumstances to refuse the application. On the facts of that case

H

I

- A the plaintiff had notified the defendant of their intention to file an affidavit in reply, albeit late, but more materially the critical factor in weighing the options before the court when dealing with such an application, it was observed there, was to consider whether the refusal of the extension would result in grave injustice to the party applying for the extension to advance his case.
- B
- [14] Lau Bee Lan J in *Bank Utama (Malaysia) Bhd v Rindaya Sdn Bhd* [2006] 8 CLJ 29 also when allowing an application for extension of time, in the context of O 1A and O 2 r 3 of the RHC 1980, to file an affidavit in reply made the following salient comments:
- C Secondly, in my opinion, O 1A envisages a scenario where when the judge is confronted with a situation of a technical non-compliance of the RHC by a party ('the applicant') and there is opposition therein ('the opposing party'), he has to strike a balance between the need to do justice to the opposing party in the particular case vis a vis the need of the applicant to comply with the provisions specified in the RHC. It is also my view that complementary to O 1A, O 2 r 3 provides the bench mark wherein the limit of non-compliance of the RHC by the applicant can be tolerated ie, whether such non-compliance has occasioned a substantial miscarriage of justice to the opposing party.
- D
- E [15] As regards the issue of whether O 1A and/or O 2 r 3 of the RHC 1980 could be invoked and/or could come to assistance of the plaintiff, I had for consideration the decision of the Court of Appeal in *Amirthanayaki Kumurasamy v Lembaga Kelayakan Profesional Undang-Undang Malaysia (Legal Profession Qualifying Board Malaysia)* [2010] 1 MLJ 656; [2010] 6 CLJ 593 where it was held that although the mode of commencing proceedings was wrong there, such 'procedural technical objections' as to the commencement of actions should not be allowed to obstruct the process or access of justice to the deserving.
- F
- G [16] We also now have the benefit of the deliberations of the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 centered on the intention behind the use of the words 'must' in various rules in the RHC 1980 (as is also is found in O 32 r 13(2)) and also as to what would amount to 'technical non-compliance' as found in O 1A of the RHC 1980. *Captain Hamzah's* case above involved a situation where the validity period of a writ had expired and there was a non-renewal of the writ in due time. The Federal Court held there that by O 1A of the RHC 1980, 'technical non-compliance' of any rule may be remedied and this may supersede the mandatory requirements of the RHC
- H
- I

1980 in appropriate cases. The term 'technical non-compliance' in O 1A, it was held by our highest court, referred to non-compliance with a rule which was not 'fundamental' in nature with regard to the justice of the particular case. Some rules as set out in the RHC 1980 it was noted there, are so vital and they go to the root of the matter; such rules cannot be broken or departed from. Recourse under O 1A (for technical non-compliance) of the RHC 1980 was not therefore available to a delinquent party who had breached such strict rules (as was in that case where the writ had not been properly renewed).

A

B

[17] The Federal Court's decision in *Captain Hamzah's* case does not therefore, in my reading, restrict this court from further examining whether the non-compliance complained of was of such a vital and fundamental procedural rule and whether the saving effect of O 1A of the RHC 1980 can be extended to the plaintiff, as in this case.

C

In my view, since *time could be extended* by consent of parties or on application of a defaulting party, (notwithstanding that it was not availed of by the plaintiff in this instant situation), the requirement of O 32 r 13(2)(b) did not amount to a stipulation so 'vital as to go to the root of the matter' or was of such a 'fundamental' nature, although 'must' was the term used in the relevant rule to specify the requirement.

D

E

[18] When faced with an issue of whether to override a procedural non-compliance as we have here, the court has to also balance justice as between the parties (as shown in the judgments I have referred to earlier) with particular regard being given to the question whether any serious miscarriage of justice would be occasioned, as in this case to the defendant if the affidavit in reply is allowed to be read in the disposal of encl 4, notwithstanding that it was filed late.

F

[19] Having the above in mind and not convinced that there will be any serious miscarriage of justice occasioned to the defendant, I overruled the preliminary issue raised by the defendant and held that encl 9 and subsequent affidavits could be read in the disposal of this application.

G

ISSUE: WHETHER THERE WAS SUFFICIENT REASONS TO STRIKE OUT THE PRESENT ACTION

H

[20] It must be emphasised at the outset that the plaintiff admitted and accepted that the order of court of 31 October 2008 in the 2006 suit was in the nature of a *peremptory order*. There was no disputing the fact that a breach of a

I

- A peremptory order was tantamount to a contumelious conduct which would invite upon the offending party the most dire of consequences, namely, even the striking out of the very action itself (*Palm Breeze Sdn Bhd v Ho Hup Construction Co Bhd* [1998] 4 MLJ 674; [1998] 5 CLJ 516, *Neo Kee Seng v Ong Seng Development Sdn Bhd & Ors* [2000] 1 CLJ 715, *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97) ('... the obedience to court orders is the foundation on which its authority is founded' per Nicholas Browne-Wilkinson VC in *Re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 at p 1203).
- B
- C [21] The 'notice to show cause' issued by the deputy registrar and the consequent order striking out the 2006 suit was perfectly regular under the RHC 1980, although the defendant themselves did not proceed to apply to strike out the suit as allowed for in the second limb of the order of 31 October 2008. Our courts pursuant to O 34 r 3 (and Form 64) of the RHC 1980 and its inherent jurisdiction have the power to dismiss an action for want of prosecution, (see Augustine Paul JC (as he then was) in *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; [1997] 3 CLJ 51— the previous O 34 r 8(2), in the RHC 1980 refers).
- D
- E [22] What need to be highlighted here was that in striking out the 2006 suit on 15 September 2009, the learned deputy registrar had made an express finding that the delay of the plaintiff in not prosecuting that suit or the want of prosecution evident there was the result of 'intentional and contumelious' default or conduct of the plaintiff. This express finding by the deputy registrar was not disputed by the plaintiff.
- F
- G [23] The plaintiff then, as noted earlier, lodged an appeal to the judge in chambers against that deputy registrar's decision of 15 September 2009. That appeal was dismissed and it has not been shown to me that the said dismissal of the appeal by the judge was on any ground other than that as was determined by the deputy registrar, namely that the plaintiff's delay in proceeding with the 2006 suit was 'intentional and contumelious' default which the court could not countenance.
- H The plaintiff did not thereupon take the matter further by way of any appeal be it against the reason for or in respect of the concurrent conclusions reached by the deputy registrar and the judge for striking out the 2006 suit.
- I [24] The application that was before me for determination and disposal was the defendant's application in this present proceeding (the second suit of the plaintiff on the same facts and for the same relief against the defendant) to strike out this action on the ground that it was vexatious and an abuse of the process of the courts.

This court had to proceed to deal with encl 4 on the basis that the plaintiff's 2006 suit had been properly struck out by the court on the grounds of the plaintiff's 'intentional and contumelious' delay in that action.

A

LAW: STRIKING OUT OF SECOND SUIT

B

[25] Our Court of Appeal in *Boo Are Ngor v Chua Mee Liang* [2008] 4 CLJ 533 has held that where a plaintiff's action is struck out for disobedience of a peremptory order, a second action would constitute an abuse of the process of the court.

C

[26] In *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 48; [2001] 3 CLJ 233, the Federal Court has cited with approval Watkins LJ in *Janov v Morris* [1981] 3 All ER 780 to the following effect:

D

In the event of his action being struck out for failure to obey a peremptory order, he may appeal against that order seeking, if necessary an extension of time within which to so.

The outcome of such an appeal will to some extent depend on the excuse for failure preferably set forth in affidavit form provided for the court's consideration. *If a litigant neglects to avail himself of that procedure and brings a fresh but precisely similar action to that ordered to be struck out*, without any explanation then or at any later time for a failure to obey the peremptory order, he should not be surprised that *the commencement of the second action is found to be an abuse of the process of the court and for that reason it too, is struck out*.

E

F

[27] Counsel for the plaintiff however in his submissions laid stress on the fact that the limitation period to bring proceedings against the defendant had not as yet expired and the plaintiff was not disentitled from instituting this fresh action. He relied on the decision in Singapore of Lai Kew Chai J in *Sim Lim Finance Ltd v Highlight Industry Pte Ltd & Ors* [1987] 1 MLJ 182 in support of his contention why the present action should not be ruled to be an abuse of the process of court.

G

It must be pointed out that *Sim Lim Finance* was a case where the power to dismiss an action for want of prosecution was the issue in contention, as opposed to the issue of whether a second suit was an abuse of the court process (This decision was considered in *Arab-Malaysia Finance Bhd*, a similar case which dealt with the powers of the court to strike out an action for want of prosecution; here specifically upon a notice to show cause being issued by the court).

H

I

[28] Interestingly and more materially to the issue at hand in this application by the defendant to strike out the second suit was however the following quote

A from Lord Diplock in *Birkett v James* [1977] 2 All ER 801, reproduced in Lai Kew Chai J's judgment in *Sim Lim Finance*:

B The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay or the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

C The *Sim Lim Finance* judgment then went on to state:

D If an action was dismissed under *ground (one)* then a second action by the plaintiff pleading the same cause of action could be dismissed as abuse of process. On the other hand, if the first action was dismissed on *ground (two)*, a second action by the same plaintiff raising the same cause of action, if filed within the period of limitation, could not be dismissed as abuse of process. In the result, it has been observed that where the period of limitation has not lapsed, it would be exceptional to dismiss an action on ground (two).

E The *Sim Lim Finance* judgment once again quotes Lord Diplock in *Birkett v James* as follows:

F I am of opinion that the fact that the limitation period has not expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution *where no question of contumelious default on the part of the plaintiff is involved*; ...

G [29] It is therefore an accepted principle of law that where a suit has been struck out in the context of a peremptory order of court based on the ground of 'intentional and contumelious' default of the plaintiff in that suit, a second suit against the same defendant based on the same facts and for the same relief should be treated as an abuse of the process of court and struck out as well. The fact that the second suit is filed well before the expiry of the limitation period is of no consequence.

H CONCLUSION

I [30] Accordingly, I held that the filing of this action (the second suit by the plaintiff against the defendant), notwithstanding that it was brought before any limitation in respect of the cause of action had set in, was an abuse of the process of the court by the plaintiff. I therefore granted prayer 1 of encl 4 with costs and ordered that writ and statement of claim in this action be struck out.

[31] The defendant was allowed one set of costs for both the suit and this application in encl 4 and fixed the sum to be paid by the plaintiff to the defendant thereto at RM7,500. A

Application allowed with costs for both application and suit. B

Reported by Ashok Kumar

C

D

E

F

G

H

I